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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. JOE MINERALS CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether in establishing primary national ambient air quality standards under Section 109(b)(1) of the Clean Air Act, the Administrator of the Environmental Protection Agency must consider the impact of a standard on the "public . . . welfare and the productive capacity of [the Nation's] population" in determining the "adequate margin of safety" to be imposed beyond the limit which is "requisite to protect the public health."

2. Whether the Administrator must separately delineate the limit which is "requisite to protect the public health" from the additional allowance to be made for "an adequate margin of safety" to assure his rational consideration of the differing factors relevant to each determination and to provide an adequate basis for judicial review.*

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* In addition to St. Joe Minerals Corporation, the Lead Industries Association, Inc. (LIA) was a petitioner in the Court of Appeals. LIA has filed a separate petition for a writ of certiorari in this Court. Respondent in the Court of Appeals was the Environmental Protection Agency (EPA). The Bunker Hill Company was an intervenor. The Natural Resources Defense Council, Inc. and the Air Resources Board of the State of California participated as *amici curiae*.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:	PAGE
American Petroleum Institute v. *Costle*, C.A. No. 79-1104	13
American Trucking Associations, Inc., v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397	10
Amoco Oil Co. v. *EPA*, 501 F.2d 722 (D.C. Cir. 1974)	3
Appalachian Power Co. v. *EPA*, 477 F.2d 495 (4th Cir. 1973)	12
Association of American Railroads v. *Costle*, 562 F.2d 1310 (D.C. Cir. 1977)	10
Burlington Truck Lines v. *United States*, 371 U.S. 156	12
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402	12
Dry Colors Mfrs. Assoc. v. *Department of Labor*, 486 F.2d 98 (3d Cir. 1973)	12
Environmental Defense Fund v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971)	12
Ethyl Corp v. *EPA*, 541 F.2d 1 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 426 U.S. 941	3, 12
FTC v. *Fred Meyer, Inc.*, 390 U.S. 341	10
Industrial Union Dep't, AFL-CIO v. *American Petroleum Institute*, _____ U.S. _____, 65 L.Ed 2d 1010	8, 10, 11

Table of Authorities Continued

CASES: PAGE

Lehigh & New England Ry. Co. v. *ICC*, 540 F.2d 71 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 10

Lubrizol Corp. v. *EPA*, 562 F.2d 807 (D.C. Cir. 1977) .. 10

Natural Resources Defense Council, Inc. v. *Train*, 411 F.Supp. 864 (S.D.N.Y.), *aff'd*, 545 F.2d 320 (2d Cir. 1976) 3

Panama Refining co. v. *Ryan*, 293 U.S. 388 8

Portland Cement Ass'n v. *Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 12

Schechter Poultry Corp. v. *United States*, 295 U.S. 495 . 8

STATUTES:

28 U.S.C. §1254(1) 1

Air Quality Act:

Public Law 90-148 (1967) 9

Clean Air Act:

42 U.S.C. §7401(b)(1), Section 101(b)(1) 2, 10

42 U.S.C. §7408, Section 108 3

42 U.S.C. §7409(b), Section 109(b) 2

42 U.S.C. §7409(b)(1) (Supp. I 1977), Section 109(b)(1) 2, 8, 10

42 U.S.C. §7607(b)(1) (Supp. I 1977), Section 307(b)(1) . 14

CONGRESSIONAL REFERENCES:

S. REP. NO. 90-403, 90TH CONG., 1ST SESS. 28 (1967).... 9

S. REP. NO. 91-1196, 91ST CONG., 2D SESS. 10 (1970).... 8

H.R. REP. NO. 95-294, 95TH CONG., 1ST SESS. 112 (1977) 9, 10

A Legislative History of the Clean Air Amendments of 1970, 93rd Cong. 2d Sess. (1974) 8, 9

A Legislative History of the Clean Air Act Amendments of 1977, 95th Cong. 2d Sess. (1978) 9, 10

Table of Authorities Continued

RULES AND REGULATIONS:	PAGE
40 FED. REG. 59534 (1975)	11
41 Fed. Reg. 46562 (1976)	11
42 Fed. Reg. 63080 (1977)	5
42 Fed. Reg. 63081 (1977)	5
43 Fed. Reg. 46246 (1978)	1
44 Fed. Reg. 58660 (1979)	11
44 Fed. Reg. 58661 (1979)	11

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit is not yet officially reported and is set forth in the separately bound Appendix to this petition as Appendix A. The Environmental Protection Agency's (EPA) final regulation and statement of basis and purpose are published at 43 Fed. Reg. 46246 (1978), and are also set forth in the separately bound Appendix as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The pertinent part of Section 109 of the Clean Air Act (Act) provides (42 U.S.C. §7409(b)(1) (Supp. I 1977)):

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. . . .

Section 101(b)(1) of the Act provides (42 U.S.C. §7401(b)(1) (Supp. I 1977)):

> The purposes of this subchapter are—
>
> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

STATEMENT

St. Joe Minerals Corporation (St. Joe) seeks review of a National Ambient Air Quality Standard (air quality standard) promulgated by the Administrator of the Environmental Protection Agency (Administrator) under the purported authority of Section 109(b) of the Clean Air Act (42 U.S.C. §7409(b)) (Act) which limits public exposure to lead in the ambient air to 1.5 micrograms of lead per cubic meter of air (ug Pb/m^3). The Administrator's actions are premised upon his findings that significantly elevated levels of lead in the blood will result in adverse health effects that can lead to health problems, including anemia and lead intoxication.

Ambient air, at which the standard is directed, is a relatively minor source of lead exposure and, thus, a

relatively insignificant contributor to elevated blood lead levels. The Court of Appeals found that it ranks third behind diet and other forms of direct oral ingestion as a source of lead exposure. App. A, pps. 4a-5a. Moreover, even as to airborne lead, EPA data show that stationary sources, such as St. Joe's lead smelting plant at Herculaneum, Missouri, account for only approximately five per cent (5%) of lead emitted into the air, and that even those emissions were comprised primarily of non-respirable particles.[1] J.A.[2] 2805. Ninety per cent (90%) of lead in ambient air is from gasoline combustion, a source which already has been regulated by the Administrator. *See Amoco Oil Co.* v. *EPA,* 501 F.2d 722 (D.C. Cir. 1974); *Ethyl Corp.* v. *EPA,* 541 F.2d 1 (D.C. Cir. 1976) (*en banc*), *cert. denied,* 426 U.S. 941.

The Administrator was compelled to list lead as a pollutant under Section 108 of the Act (42 U.S.C. §7408) and thereafter to undertake the regulatory proceeding culminating in the air quality standard at issue here, by a court order entered in *Natural Resources Defense Council, Inc.* v. *Train,* 411 F. Supp. 864 (S.D.N.Y.), *aff'd,* 545 F.2d 320 (2d Cir. 1976). Relying upon a series of assumptions and determinations, he first proposed a 1.5 ug Pb/m^3 standard as the level

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[1] Ninety-nine per cent (99%) of the lead particulates emitted from St. Joe's Herculaneum plant are non-respirable and cannot be absorbed into the blood stream through the lungs. App. A, p. 70a. The Administrator nevertheless speculated, without any record support, that these particulates might be ingested orally or through weathering might in time become respirable. App. A, p. 72a.

[2] "J.A." refers to the Joint Appendix filed in the Court of Appeals.

necessary to prevent a certain "subclinical"[3] change in blood known as erythrocyte protoporphyrin elevation (EP elevation) in children between the ages of 1 and 5 years. App. A, pps. 16a-21a. He found this age group to be the most sensitive to elevated blood lead levels. App. A, p. 17a.

After he received and considered comments on the proposed standard, the Administrator acknowledged that the very early stages of EP elevation, which the proposal sought to prevent, might not have health significance (App. A, p. 22a), and that blood lead levels could be twice as high as he had initially proposed (App. A, p. 23a). In the end, however, the Administrator adopted the same air standard as originally proposed,[4] by applying more conservative assumptions at certain points in his recalculation.[5] App. A, pps. 23a-24a. These more conservative assumptions were justified by the Administrator, in part, as necessary to

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[3] A "subclinical" effect or "biological response" is essentially a deviation from the physical norm that is not clinically detectable, *i.e.*, which cannot be demonstrated by the classic techniques of physical examination but rather can be detected only through special testing. *See, e.g.*, J.A. 1334. Healthy persons continually experience such deviations with no adverse health effects. App. A, pps. 54a-55a.

[4] The standard was slightly modified to improve the validity of monitoring data by enlarging the averaging period for the standard from a monthly to a quarterly basis. App. A, p. 24a.

[5] The following table, which sets forth the assumptions made by the Administrator, demonstrates the impact that even very slight changes can have upon these assumptions:

	EPA ASSUMPTION	IF CHANGED TO	RESULTING NAAQS
1.	(No Change)	----------	1.5
2.	Maximum safe blood lead level = 30 ug Pb/dl (App. B, p. 128a)	Maximum safe blood lead level = 35 ug Pb/dl	3.0

allow an adequate margin of safety. *Id.* However, the Administrator neither attempted to identify the extent to which this resulting margin of safety exceeded the level necessary to protect against observed adverse health effects, nor sought to consider factors other than health risks in setting the margin or margins of safety allowed.

St. Joe, operator of the Nation's largest lead smelter, petitioned the Court of Appeals to set aside the air standard because the cost of an effort to comply utilizing the technology identified by EPA — $52 million in capital costs and $13 million in increased annual costs — threatens the continued economic viability of its Herculaneum plant. J.A. 2241. The Administrator himself concluded that "some primary and secondary lead and copper smelters may be severely strained

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3.	Protect 99.5% of sensitive population (App. B, p. 135a)	Protect 99.0% of sensitive population	2.0
4.	Standard deviation for lead in blood = 1.3 (App. B, p. 136a)	Standard deviation for lead in blood = 1.25	2.5
5.	Non-air sources of lead in blood = 12 ug Pb/dl (42 Fed. Reg. 63080-63081)	Non-air sources of lead in blood = 10 ug Pb/dl	2.5
6.	Air lead/blood lead ratio = 1:2 (42 Fed. Reg. 63081)	Air lead/blood lead ratio = 1:1	3.0
7.	----------	Change All	11.0

Although each of the above changes would not have more than a slight effect upon the final standard, their cumulative impact is to increase the standard to 11.0 ug Pb/m^3—*a more than sevenfold increase*.

economically in achieving emission reductions that may be required in implementing the proposed air quality standard." App. B, p. 157a. Even with the staggering financial outlays the standard calls for, however, any effort on the part of primary lead smelters to comply will fail because the technology does not exist to achieve the degree of reduced emissions required.[6]

St. Joe contended, *inter alia,* that the Administrator should have identified the margin of safety his final standard provided beyond the limit required to protect against observed health effects and should have considered a variety of factors in setting this margin, including the severity of the health effects to be prevented, the degree to which scientific knowledge is unable to predict the level necessary to protect against adverse health effects, the technological feasibility of compliance, and the economic impact of the safety margin. Brief for Petitioner St. Joe Minerals Corporation at 20-25.

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[6] St. Joe and other primary lead smelter operators have already installed air pollution controls which reduce lead levels in their smoke stack emissions. In fact, the compliance control factor for primary lead smelter stack emissions, as determined by EPA, is 98.2%. J.A. 2841, 2857. The principal remaining source of lead emissions from primary smelters such as St. Joe's Herculaneum Smelter is so-called "fugitive emissions," those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. As EPA itself acknowledges (App. B, p. 157a.) control of fugitive lead emissions to levels required by the EPA lead standard is not feasible through installation of available technology. J.A. 2229-33. Moreover, even if fugitive lead smelter emissions could be eliminated entirely, the background levels of lead in the vicinity of primary lead smelters prevent continuous and consistent compliance with the lead standard at a level of 1.5 ug/m³. J.A. 2231, 2248, 2255-6. Thus, although St. Joe and the other primary lead producers have already achieved very high levels of emissions control, compliance with the final EPA lead standard by primary lead smelters is not technologically possible.

The Court of Appeals misconceived St. Joe's contentions by characterizing St. Joe's position as a claim that the statutory direction to allow an "adequate margin of safety" required the Administrator to consider economic and technological feasibility in setting a primary air quality standard without apparent recognition of the health protective limit/margin of safety distinction. App. A, p. 31a. The Court thus proceeded, without itself differentiating between the health protective limit and the added margin of safety, to dismiss St. Joe's contentions as contrary to the legislative history that technological and economic feasibility should not be considered in establishing the health protective limit. App. A, pps. 31a-38a.

REASONS FOR GRANTING THE WRIT

This is the Court's first opportunity to consider the proper application of the allowance for a "margin of safety" under the Clean Air Act Amendments of 1970. The case presents important questions as to the extent to which the regulation of the nation's ambient air to protect the public from adverse health effects should accommodate other societal needs as well, such as the impact of a primary air quality standard on the nation's economy. In light of legislative history indicating that Section 109 was intended to force the development of new technology, St. Joe does not question the propriety of setting such standards at a level that protects the public from *known* adverse effects even though achievement of the standard may be at present economically and technologically infeasible. These important feasibility factors, however, should be considered together with the severity and the certainty of the more speculative health risks to be guarded against, by the

Administrator's addition of an "adequate margin of safety" beyond the health protective limit, in his determination of what that margin should be.[7]

1. The Court of Appeals' decision that economic and technological feasibility may not be considered in determining the margin of safety is not sound. The legislative history, upon which it relied, limits the Administrator's consideration to health effects in identifying the maximum level of air pollution at which the public is protected from *known* adverse health effects (health protective limit), the necessary first step in the formulation of a primary ambient air quality standard under Section 109(b)(1). *Cf. Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute,* _____ U.S. _____, 65 L.Ed 2d 1010, 1035-37. The margin of safety, on the other hand, must merely provide a "reasonable degree of protection . . . against hazards which research has not yet identified."[8] Neither the

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[7] To permit the Administrator to speculate as to theoretical health risks, without regard to the concrete harm to the public welfare that flows from unduly stringent standards and without guidance as to "where on the continuum of relative safety he should draw his line," as the Court of Appeals decision permits, is a "sweeping delegation of legislative power" that raises serious Constitutional questions. *See, Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 539; *Panama Refining Co.* v. *Ryan,* 293 U.S. 388. *See also Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.* _____ U.S. _____, 65 L.Ed. 2d 1010, 1037 (Plurality opinion), 1054-55 (Rehnquist J. concurring in the judgment). The Court need not reach this issue here, however, as the text demonstrates, because the Court of Appeals erred in its construction of the standards to be applied under the Act in setting an appropriate margin of safety.

[8] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970) (hereafter "S. Rep."), The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Clean Air Amendments of 1970,* at 410 (1974) (hereafter "1970 *Legis. Hist.*").

statute nor its legislative history warrant a similar limitation on the factors that the Administrator should consider in determining an "adequate margin of safety," beyond the health protective limit to protect against theoretically possible health effects at still lower levels of exposure.[9] The consideration of economic and technological feasibility factors in setting the appropriate margin of safety is not inconsistent with expressions of Congressional intent that such factors not be considered in setting the health protective level. These considerations enter into the standard-setting process only *after*

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[9] To the contrary, the legislative history reveals that fulfillment of the Act's objectives necessitates attention to economic and feasibility considerations. As early as 1967, in enacting the first Air Quality Act (Pub. L. 90-148), Congress evidenced an intention that the development of air quality standards "be influenced not only by a concern for the protection of health or welfare, but also by economic, social and technological consideration." S. Rep. No. 90-403, 90th Cong., 1st Sess. 28 (1967); *See also, id.* at 10-11. Then, in rewriting the Act in 1970, Congress reaffirmed that its guiding principles were still "the test of *reasonableness* and *feasibleness*." 1970 *Legis. Hist., supra*, note 8, at 111 (statement of Rep. Staggers) (emphasis added). *See also* 1970 *Legis. Hist., supra,* note 8, at 808 (remarks of Rep. Springer).

Finally, in amending the Act in 1977, Congress emphasized again that its purpose was to "insure the protection of the public health and the environment . . . while *at the same time considering the energy and economic needs of this Nation.*" H. R. Rep. No. 95-294, 95th Cong., 1st Sess. 112 (1977) (hereafter "H.R. Rep."), The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Clean Air Act Amendments of 1977,* at 2501-02 (1978) (hereafter "1977 *Legis. Hist.*") (emphasis added). *See also, id.* at 367 (remarks of Sen. Stafford); *id.* at 369 (remarks of Sen. Stevens); *cf.* H.R. Rep., *supra,* at 61, 1977 *Legis. Hist., supra,* at 2528 ("[A] healthful environment, energy conservation, and a sound economy are interrelated factors bearing on the quality of life of the Nation.")

the health protective level has been identified, and thus, do not compromise the public health.

The Court of Appeals thus erred in ignoring the broader objectives of the Act — which expressly include, in addition to health, the promotion of the public "welfare and the productive capacity of [the Nation's] population" (Section 101(b)(1), 42 U.S.C. §7401(b) (1)) — when it held that economic and technological feasibility are not factors that must be weighed in the promulgation of a primary air quality standard.[10]

The need to consider these additional factors in establishing a margin of safety pursuant to Section 109(b)(1) is supported by key passages in its legislative history which make clear that primary air quality standards were not intended to eliminate all *de minimis* or as yet undetected potential health risks.[11] This construction is also consistent with the Administrator's concessions in an analogous context that air quality standards

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[10] Section 101 (b)(1) of the Act, the "purposes" section, is an explicit statement of statutory intent which must be considered in determining whether economic and technological feasibility and other non-health related factors are relevant to margins of safety determinations. *See FTC* v. *Fred Meyer Inc.*, 390 U.S. 341, 349; *American Trucking Assns. Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 409-10; *Association of American Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Lubrizol Corp.* v. *EPA*, 562 F.2d 807, 815-16 n. 20 (D.C. Cir. 1977); *Lehigh & New England Ry. Co.* v. *ICC*, 540 F.2d 71, 79 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061.

[11] Congress rejected the argument that ambient air quality standards should be set at "zero or background levels" on the grounds that "this no-risk philosophy ignores all economic and social consequences and is impractical." H.R. Rep., *supra*, note 9, at 127, 1977 *Legis. Hist., supra*, note 9, at 2594. *Accord, Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute, supra*, _____ U.S. at _____, 65 L.Ed 2d at 1034-35 (plurality op.).

were not intended to precipitate the "closure" of important industries.[12] Finally, it is consistent with the Administrator's own practice of weighing cost considerations in setting hazardous air emission standards under Section 112 of the Act, which require an "ample margin of safety" as opposed to simply an "adequate margin."[13]

The "technology forcing" purpose of the Act's sponsors is fully satisfied by exclusive consideration of health in the Administrator's initial determination of the health protective limit. The extension of this narrow focus to the "margin of safety" element of an air quality standard is not only without legal justification, but also is likely to be counter-productive even in terms of the health objectives of the Act because, as the Act itself recognizes, industry's resources to control pollution are limited.[14]

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[12] *See, e.g.*, 44 Fed. Reg. 58660 (1979) (carcinogens) ("Congress did not contemplate closure of the nation's basic industries, or even widespread industry closures."); 40 Fed. Reg. 59534 (1975) (vinyl chloride).

[13] *See, e.g.* , 44 Fed. Reg. 58661 (1979) (carcinogens) ("The Administrator also believes, however, that he may consider other social and economic factors in determining whether an ample margin of safety is provided by a given control level."); 41 Fed. Reg. 46562 (1976) (vinyl chloride); 40 Fed. Reg. 59534 (1975) (vinyl chloride).

[14] The need to construe specific statutory provisions so as to promote broad Congressional objectives was recognized by Justice Powell in *Industrial Union, supra.* According to Justice Powell, consideration of economic factors in setting toxic pollutant standards under the Occupational Safety & Health Act is essential to insure that industry resources are allocated effectively. *Industrial Union Dep't., AFL-CIO* v. *American Petroleum Institute,* _____ U.S. _____, 65 L.Ed. 2d 1010, 1052 (Powell, J., concurring). Justice Powell viewed as irrational a statutory interpretation requiring industry resources to be expended to reduce certain risks without regard to economic considerations, while other risks that could be reduced in a cost-effective fashion remain unregulated.

2. Given the need to consider different factors in making health protective limit and margin of safety determinations, under well-established principles of administrative law, the Administrator was required not only to consider but also to articulate clearly his separate consideration of the appropriate factors relevant to each.[15] Such a delineation is necessary to assure that each determination is made in a rational manner, with due consideration of the different factors applicable to each, and to assure that the courts are able to discharge their review function properly. This is particularly true in the circumstances of this proceeding where the final standard adopted, with equal logic, could have been at least seven times less stringent merely by making slightly different "assumptions." *See* fn. 5, *supra.* As this Court has aptly observed:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (citation omitted) *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167.

This does not mean, as the Court of Appeals construed St. Joe's position (App. A, p. 31a), that the Administrator is required to observe a rigid two-step

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[15] *See, e.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420; *Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 400, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921; *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 506-07 (4th Cir. 1973); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 33-37 (D.C. Cir. 1976), *cert. denied* 426 U.S. 941; *Dry Colors Mfrs. Assoc.* v. *Department of Labor*, 486 F.2d 98, 105-06 (3d Cir. 1973).

methodology in arriving at a primary air quality standard. It means only that, regardless of the methodology used, his statement of basis and purpose must show his separate consideration of the health protective limit and the allowance beyond that limit for a margin of safety in a manner that clearly sets forth his basis for each determination.

3. The exclusion of economic and technological feasibility in setting the margin of safety element of an air quality standard threatens serious disruption to the Nation's economy. The Administrator concedes, for example, that the standard at issue here may severely strain domestic primary and secondary lead smelters (App. B, p. 157a), which by themselves constitute an important segment of the economy. There are, in addition, a number of other air quality standards affecting equally important domestic industries presently at various stages of regulatory and judicial consideration. Ambient standards presently exist for four substances other than lead: sulfur dioxide, nitrogen dioxide, particulate matter, and photochemical oxidants (ozone). These standards affect the operations of virtually every industry in the country. The Administrator is now reevaluating, by statutory directive, the ambient standards for sulfur dioxide and particulates and is considering the establishment of a new "short-term" standard for nitrogen oxides. In addition, a revised ambient standard for ozone is now under review in the District of Columbia Circuit (*American Petroleum Institute, et al.* v. *Costle*, C. A. No. 79-1104 and consolidated cases).

Thus the appellate court's ruling, and the excessively stringent air quality standards which will be promulgated in reliance thereon, will serve to impede domestic industry's ability to compete in domestic and

foreign markets, to lessen competition within industries by forcing some firms out of business, and even, possibly, to force some industries out of existence altogether, with the result that existing unemployment, inflation, and balance of trade problems will be exacerbated without any commensurate benefit to the public health. This Court's construction of the factors to be considered by the Administrator in setting ambient air standards would prevent this unwarranted economic harm.

4. A definitive resolution of the issues presented at this time, in light of the number of pending and likely future proceedings, will provide necessary guidance as to the factors to be considered in those proceedings. Substantial administrative and judicial resources would be conserved by an early resolution of the questions presented here. Moreover, venue to review Section 109 standards is vested by Section 307(b)(1) of the Clean Air Act exclusively in the Court of Appeals for the District of Columbia Circuit (42 U.S.C. §7607(b)(1) (Supp. I 1977), and there is consequently no reason to await further development in the other circuits of the issues presented.

CONCLUSION

This petition for a writ of certiorari should be granted.

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